No. 41.

BRIEF FOR APPELLANTS

Brief of Garber & White for Appts.

SUPREME COURT OF THE UNITED STATES

October Term, 1899

Filed Oct. 10, 1899

No. 41

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Clerk

THE CRYSTAL SPRINGS LAND AND WATER COMPANY AND S. G. MURPHY, APPELLANTS,

vs.

THE CITY OF LOS ANGELES, RESPONDENTS.

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JOHN GARBER,
Attorneys for Appellants,

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City Attorney of Los Angeles City, and
LEE & SCOTT,
Attorneys for Respondents.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER , 1899

(16,751)

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CRYSTAL SPRINGS LAND AND WATER COMPANY and S. G. MURPHY.
Complainants and Appellants,
vs.
THE CITY OF LOS ANGELES,
Defendant and Respondent.

BRIEF FOR THE PLAINTIFF.

STATEMENT OF CASE.

I.

The sole question raised on this appeal is the jurisdiction of the Circuit Court, and as all the parties are citizens of the State of California the jurisdiction depends upon whether or not a federal question is involved.

On the 22d of March, 1843, the Mexican Governor of the Californias granted to Maria Ignacia Berdugo a tract of land now in Los Angeles county, California, known as the Rancho Los Feliz, which tract is bounded on the south by the northern boundary of the city of

Los Angeles. The claim under this grant was presented to the Board of Commissioners appointed to ascertain and settle private land claims in the State of California. On the 26th of October, 1852, the claim was confirmed by the Board, which decision was affirmed by the United States District Court for the Southern District of California at its December term in 1856, and it was therein decreed that the lands of which confirmation was made were situated in the county of Los Angeles, known by the name of Los Felis, and being the same lands granted by Manuel Micheltorena on the 22nd of March, 1843, and bounded on the north by the lands of Julio Verdugo, on the south by the river Los Angeles, on the east by the ranch of Juana Moreno and on the west by the mountains; and the premises were subsequently surveyed under the authority of the United States, and on the 18th of April, 1871, a patent was issued by the United States to the said Maria Ignacia Verdugo, granting to her the said Rancho Los Felis. (Tr. p. 2.)

On the 20th of October, 1784, a grant was made by Pedro Fajes, the Spanish Governor of the Californias, to Julio Verdugo and others of a tract of land of eight square leagues, bounded on the western side by the Los Angeles river, and known as the San Rafael Rancho, which grant was confirmed on the 12th of January, 1798, and after the acquisition of the State of California by the United States, it was presented to and confirmed by the Board of Land Commissioners aforesaid on the 11th day of September,

1855, and by the District Court on June 4th, 1857, and on the 28th of January, 1882, a patent was issued by the Government of the United States conveying said tract of land to the claimant. (Tr. p. 3.)

On the 26th of October, 1852, the Mayor and Common Council of the city of Los Angeles (which was at that time the corporate name of the city) filed a claim with the Board of Commissioners, claiming the confirmation of the title of the city to a tract of land containing 16 square leagues and designated as the city of Los Angeles, situated in the county of that name, and which claim was founded on a Mexican grant to the petitioners, made on the 25th of August, 1844, by Manuel Micheltorena, the then Governor of the department of the Californias.

On the 5th of February, 1856, the Commissioners rendered a decree confirming the claim in part, to wit: to 4 square leagues of land, and rejected the remainder. From this decree both the city and the United States appealed to the District Court aforesaid, but the appeals were dismissed, and the city permitted to proceed under the said decision as under a final decree.

Thereafter there was a survey made of the 4 square leagues and a patent was issued on the 9th day of August, 1866, from the United States to the city of Los Angeles for the said lands. (Tr. pp. 3 and 4, fols. 5 and 6.)

The Los Angeles river rises in the mountains to the north of the city of Los Angeles and of the lands patented to the city, and flows through

the said Rancho Los Felis and the Rancho San Rafael from the north to the south, and forms the common boundary of the said two ranchos for a considerable distance, and thence flows into the city of Los Angeles, which lies to the south, and through the lands described in the patent to the Mayor and Common Council, enteriug the city near the middle point of the northern boundary, and flows in a southerly direction through the city. (Tr. p. 4, fol. 6, par. IV of the Bill.)

The plaintiff, the Crystal Springs Land & Water Company, is the owner of 4.9 acres of land, part of what was known as the Crystal Springs tract, the whole of which tract was situated in the Los Felis Rancho. (Bill, par. V, p. 4, fols. 6 and 7.) Prior to the 14th of June, 1886, G. J. Griffith was the owner of the 4900 acres of the Los Felis Rancho, deriving his title through the patent of the United States to the Mexican grantee, and which tract owned by Griffith comprises all the lands of the Los Felis Rancho mentioned in the complaint, except the 4.9 acres of the Crystal Springs tract. On the 14th of June, 1886, Griffith conveyed to the Los Angeles City water Company the right to develop water upon all of the tract known as the Crystal Springs tract, (which was originally a tract of over 14 acres), except the 4.9 acres, which already belonged to the Crystal Springs Company, and also conveyed the right to develop water on the other portions of the Los Felis Rancho, bounded on the northwest by the southeasterly boundary of the

Crystal Springs tract and ranging north 11-¾ degrees east, and its prolongation to the northward to the intersection with the eastern boundary of the Rancho de Los Felis, and on the southeast by a line parallel thereto and distant from it 1000 feet, bounded on the southwest by the ditch then in course of construction from the Crystal Springs tract to the Los Angeles river, and the northeast by the eastern boundary line of the Rancho de Los Felis; and afterwards granted to the Crystal Springs Land and Water Company the right to develop water upon other portions of the Los Felis Rancho belonging to him, and in which certain pipes described in the bill were laid, the right of development being upon certain portions of the Los Felis Rancho described as water bearing lands (Tr. pp. 4 and 5, par. VI, of the bill, fols. 7 and 8.) These rights conveyed to the Los Angeles City Water Company were acquired by the Crystal Springs Land & Water Company afterwards; and prior to the commencement of this suit the Crystal Springs Land & Water Company acquired the title to a tract of land, part of the San Rafael Rancho. (*Id.* par. VI, fol. 8.)

It is further stated by the bill that north of the city and extending up the Los Angeles river to a point commencing about half a mile above the north boundary of the city and a distance of 15 or 20 miles, the valley of the Los Angeles river varies in width from about a mile to two or three miles, and that upon the Los Felis Rancho and the San Rafael Rancho is a large body of

land containing about 500 acres in which a large amount of water is percolating, and that in the said tract of land, part of the Los Felis and San Rafael Ranchos, as well as in other lands lying on both sides of the Los Angeles river, and stretching to the northward, there is an immense quantity of water percolating through the soil, and that it belongs to the owners of the said soil. (*Id.* par. VIII, fols. 8 and 9.)

The Crystal Springs Land & Water Company having acquired the title to the tracts of land in the Los Felis and San Rafael Ranchos, and the rights of development therein, excavated a ditch or tunnel from the Crystal Springs in the Crystal Springs tract in a southeasterly direction to a point known as the gate house, and a tunnel from the gate house northerly through a portion of the Los Felis Rancho and the said San Rafael Rancho, and in said excavations laid water pipe, and by means of which excavations it gathered together of the percolating waters of the said lands a large amount, to wit: 700 inches of water measured under a four-inch pressure, and by means of the pipes so laid, conducted the same to the gate-house, at which point the waters from the said pipes unite together, and are thence conveyed through pipes to the City of Los Angeles, for the purpose of furnishing the inhabitants of the city with water for domestic purposes, and furnishing the City of Los Angeles with water for flushing sewers, extinguishing fires, sprinkling the streets, and other public uses. (*Id.* par. IX, p. 6, fols. 9 and 10.)

This development was all done upon lands

which either belonged to the Crystal Springs Land and Water Company, or through those tracts upon which it had acquired the right to make such developments. By the deeds of the said G. J. Griffith, the owner of the said lands, granting the right to make such developments, and the ownership of its lands and the actual development of the waters, the Crystal Springs Land & Water Company alleges that it is, and ever since the development, has been the owner of the water and of the pipes, but subject to the rights of Murphy, one of the plaintiffs, who is the trustee under a trust deed made to secure the payment of certain bonds issued by the Crystal Springs Land & Water Company. (*Id.* par. X, p. 6, fol. 10.) (See also pars. 11, 12, 13 and 14 of the bill, fols. 10-12.)

It is then alleged that under the laws of Spain and Mexico, the grantees of the said grants made by the Spanish and Mexican Government of the said Ranchos San Rafael and Los Felis, became the owners of the waters percolating in the soil, as part and parcel of the said lands, and that the title of the plaintiff's is derived from, through and under the said Spanish grants, and the confirmation thereof by the United States authorities and the patents issued by the United States; and they claim that the rights of property thus acquired are protected by the treaty of Guadalupe Hidalgo between the United States and the Republic of Mexico, and that their title to the said water and rights to the use thereof were confirmed by the United States by and through

the proceedings before stated. (*Id.* p. 8, Par. XV.)

It is also alleged that above the Los Felis and San Rafael Ranchos there are other lands claimed from the Mexican or Spanish government by private parties, through which the Los Angeles river flows, and that there are still other lands both north and south of the patent boundaries of the city of Los Angeles, which became vested in the United States upon the acquisition of the State of California from the Mexican government, and through which said river flows, which have since said time been acquired by private parties from the United States government, and patents issued therefor, and that as to these public lands and private grants, the grantees and the United States were riparian owners, and entitled to the use of the waters of the stream as such, and that as owners of the said land, were entitled to waters percolating into the soil, whether ultimately finding their way into the Los Angeles river or not. (*Id.* p. 8, Par. XVI.)

The lands in which these excavations have been made are all in the Los Felis and San Rafael Ranchos, and the title of the complainants and right to make these developments and the ownership of the said waters comes through those Mexican grants and the confirmation thereof, and the United States patents following such confirmation

These developments have all been made on a tract of land embracing about 500 acres, through which the Los Angeles river flows, but the bed

thereof, upon this tract, is not anywhere to exceed 100 feet in width. (Tr. p. 8, Par. XVII, Fols. 13 and 14.) This tract contains a vast quantity of percolating water extending to a depth of more than 100 feet, and the developing and taking of these percolating waters does not affect the flow of the Los Angeles river. (*Id.* p. 9, Par. XVII, Fol. 14.)

On the 26th of March, 1874, the Legislature of the State of California passed an act entitled, "an act to amend the charter of the city of Los Angeles, to define its limits and rights, to enlarge its powers and provide for its more efficient government"; and among other things this act attempted to grant to the city of Los Angeles certain rights, and it did declare that there was thereby granted to the said city, to be held by it and enjoyed in obsolute ownership the full, free and exclusive right to all of the water flowing in the Los Angeles river at any point from its source or sources to the intersection of the said river with the southern boundary of the city, and the right to economically use and utilize all waters flowing beneath the surface in the bed of said river, at any point or points between the points of termini therein above given, to wit: from the source or sources of the river to the south boundary of the city. But by this act there was excepted and reserved from the operation of the said grant of the water flowing in the said river, unless the same should be condemned and taken for public use, all vested private rights to the water flowing upon the sur-

face or beneath it in the bed of said river. (*Id.* Par. XIX, p. 9.)

On the first day of April, 1876, the Legislature of California passed another act amending the charter of the city and granting the same rights with respect to the waters of the Los Angeles river and all waters flowing beneath the surface in the bed of the river, which was in the same terms as in the act of 1874. (Tr. p. 9 and 10, Par. XX.)

On the 30th of March, 1878, another act was passed by the said Legislature entitled "An act to amend an act entited, an act to revise an act, entitled an act to amend the charter of the city of Los Angeles, to define its limits and rights, to enlarge its powers and provide for its more efficient government, approved April 1st, 1876", whereby the Legislature undertook to grant the same rights to the city concerning the waters, both of the Los Angeles river and the waters flowing beneath its bed, and without any exception in favor of private rights as had been made in the act of 1874 and 1876. (Tr. pp. 17 and 18, fols. 30 and 31.)

The City of Los Angeles as alleged in the bill, claims that as the successor of the Mexican pueblo of Los Angeles, and by virtue of the laws of Spain and Mexico governing, regulating and fixing the rights of a pueblo in the waters of streams flowing through the said pueblos, and by the said several acts of the Legislature purporting to grant to the City of Los Angeles the sole and exclusive right to the waters of the Los Angeles river which stream is an innavigable stream,

flowing through the city, is the sole and exclusive owner of all the waters flowing in the Los Angeles river from its sources to the southern boundary of said city, and of the sole and exclusive right to develop waters percolating under the bed of said river or elsewhere, which flow into or become a part of the waters of the said Los Angeles river, and that the Crystal Springs Land & Water Company made the excavations and developed the water without right, and that the same belongs to the City of Los Angeles; and the city claimed that the whole space between the basis of the mountains upon each side of the river, above the northern boundary of the city, including the tract upon which this development has been made and the pipes laid, constitutes a portion of the bed of the Los Angeles river within the meaning of the said acts of the Legislature of the State of California, and that all of the waters percolating in the said soil belong to the said City of Los Angeles, and it has the sole and exclusive right to develop the waters percolating in the said lands, under and by virtue of the acts of the Legislature aforesaid, and that the developments so made by the plaintiffs were without right, and the waters so developed and flowing in the pipes belong to the City of Los Angeles, and that neither of the complainants has any right, title or interest therein. (Par. XXIII, pp. 10 and 11, fols. 16–18.)

Then follow the allegations of the bill that these claims of the City of Los Angeles are false; that the value of the property in controversy is

greatly in excess of the sum of $2000.00, and is of the value of more than $1,000,000.00. (Tr. p. 11, Par. XXIV.)

It will be noted that it was alleged that the development work and laying the pipes was completed sometime in the year 1890. (Par. XXIII, p. 10, fol. 16.)

The bill was demurred to (Tr. pp. 13 and 14) upon the ground that the court had no jurisdiction of the subject matter, and that the bill did not state facts sufficient to entitle plaintiffs to any relief against the defendant, and a plea to the jurisdiction was interposed, set out in Tr. pp. 14–16. The demurrer was argued before the court, and submitted on the 2nd day of January, 1896, on which day, by leave of the court, an amendment to the bill was permitted, setting forth the act of the Legislature of the State of California, of March 30th, 1878. (Tr. pp.17 and 18,to which,at the same time a demurrer was interposed, (P. 18, fols. 32 and 33) and on the 3rd day of August, 1896, the court rendered its decision overruling the demurrer. (Tr. pp. 19 and 20, fols. 34 and 35.)

On October 16th, 1896, the defendant filed its answer (Tr. pp. 20–41) and on the 14th of November, 1896, the replication was filed. (Tr. p. 41, fols. 73 and 74.) Upon the coming in of this answer a motion was made to dismiss the bill upon the ground that it appeared from the bill of complaint and the answer of the defendant that the court has no jurisdiction in the cause, and that the said suit does not really and substantially involve a dispute or controversy

properly within the jurisdiction of said Circuit Court, which motion to dismiss was argued and submitted to the Court, and by the Court sustained. (Tr. p. 42, fols. 75 and 76), and thereupon, on the 12th day of July, 1897, a judgment was entered dismissing the bill for want of jurisdiction. (*Id.* pp. 43 and 44, fols. 79 and 80)

The opinion of the Court is set forth in the transcript, pages 45 to 66.

An appeal was allowed and the judge certified that the jurisdiction of the court was in issue, and the question of such jurisdiction alone was certified to the Supreme Court for decision. (*Id.* pp. 68, fol. 125.)

An assignment of errors was filed. (*Id.* p. 66 and 67, fols. 121–123) and the bond given. The Court had overruled the demurrer to the bill upon the ground that the averments thereof with respect to the acts of the Legislature of the State of California set forth in the bill attempting to grant to the City of Los Angeles rights in the lands belonging to the complainant, did present a federal question, and the motion to dismiss was sustained upon the ground that the answer filed contained a sufficient disclaimer of any title under those acts, to defeat that jurisdiction.

II.

The errors in the decision of the Court below asserted by the appellants, upon which they rely, and which they intend to urge before this Court are the following:

1. The Court erred in granting the motion

to dismiss the bill upon the ground that it had no jurisdiction.

2. The Court erred in deciding that the suit was not one arising under the treaty between the United States and Mexico, and that the construction of the treaty was not drawn in question by the said suit.

3. The Court erred in deciding that the suit was not one arising under the constitution or laws of the United States, and did not involve the construction of either.

4. The Court erred in construing the pretended disclaimer in the answer as being a disclaimer by the defendant of any right, title or interest by virtue of the statutes of California set forth in the bill.

5. The Court erred in construing the said disclaimer to be sufficient to oust the jurisdiction of the Court.

III.

POINTS AND AUTHORITIES.

1. The suit does arise under the treaty with Mexico and involve its construction.

As the treaty guarantees the protection of property rights as they existed at the time of the execution of the treaty, and does not create the rights, it would seem logically to follow that upon whomsoever this duty of protection rests must needs determine whether the right claimed exists and whether it comes within the treaty stipulation. This proposition seems to

be directly decided by this Court in many different cases.

In Martin v. Hunter's Lessee, 1st. Wheaton, 304, which was an action of ejectment, the original plaintiff claimed the land under a patent granted to him by the State of Virginia in 1789 under the title supposed to be vested in that state by escheat or forfeiture. The original defendant claimed the land as devisee under the will of Lord Fairfax, which title it was claimed was protected by the treaty of peace of 1783 (*Id.* p. 356). Said Judge Story, delivering the opinion, after stating the facts agreed upon:

"The title of the defendant was perfect and " complete if it was protected by the treaty of " 1783. If, therefore, this court had authority " to examine into the whole record, and to " decide upon the legal validity of the title of " the defendant, as well as its application to the " treaty of peace, it would be a case within the " express purview of the 25th section of the act " (referring to the Judiciary Act); for there was " nothing in the record upon which the court " below could have decided but upon the title " as connected with the treaty, and if the title " was otherwise good, its sufficiency must have " depended altogether upon its protection under " the treaty. Under such circumstances it was " strictly a suit where was drawn in question " the construction of a treaty, and the decision " was against the title specially set up or claimed by the defendant. It would fall, then, within the very terms of the act.

"The objection urged at the Bar is, that this

" court cannot inquire into the title, but simply " into the correctness of the construction put " upon the treaty by the court of appeals; and " that their judgment is not re-examinable here, " unless it appears on the face of the record " that some construction was put upon the " treaty. If, therefore, that court might have " decided the case upon the invalidity of the " title (and *non constat*, that they did not) inde- " pendent of the treaty, there is an end of the " appellate jurisdiction of this court. In sup- " port of this objection, much stress is laid " upon the last clause of the section, which sec- " tion declares, that no other cause shall be re- " garded as a ground of reversal than such as " appears on the face of the record, and im- " mediately respects the construction of the " treaty, etc., in dispute.

"If this be the true construction of the sec- " tion, it will be wholly inadequate for the pur- " pose which it professes to have in view, and " may be evaded at pleasure. But we see no " reason for adopting this narrow construction; " and there are the strongest reasons against " it, founded upon the words as well as the in- " tent of the legislature. What is the case for " which the body of the section provides a " remedy by writ of error? The answer must " be in the words of the section: a suit where is " drawn in question the construction of a treaty " and the decision is against the *title set up by* " *the party*. It is therefore the decision against " the title set up with reference the treaty and " not the mere abstract construction of the

" treaty itself, upon which the statute intends to " found the appellate jurisdiction.

"How, indeed, can it be possible to decide whether" "a title be within the protection of a treaty until it" "is ascertained what that title is and whether it" "have a legal validity?"

"From the very necessity of the case, there "must be a preliminary inquiry into the exist- "ence and structure of the title before the court "can construe the treaty in reference to that "title. If the court below should decide that "the title was bad, and therefore not protected "by treaty, must not this court have power to "decide the title to be good, and therefore pro- "tected by the treaty? Is not the treaty, in both "instances, equally construed, and the title of "the party in reference to the treaty equally "ascertained and decided? Nor does the clause "relied on in the objection impugn the construc- "tion. It requires that the error upon which "the appellate court is to decide shall appear on "the face of the record, and immediately respect "the questions before mentioned in the section. "One of the questions is as to the construc- "tion of a treaty upon a title specially set up by "a party, and every error that immediately re- "spects that question must, of course, be within "the cognizance of the court."

Id., 356–359.

The same thing was decided in Smith v. The State of Maryland, 6 Cranch 286, and in that case the court agreed with the state court that

the party had no title and therefore the treaty did not operate upon it, yet, nevertheless, the controversy did involve the construction of the treaty and was within the jurisdiction of the court.

Now, in our case, we allege that under the laws of Spain and Mexico, as well as the United States, the percolating waters belonged to the owner of the soil, and also that the grantees of these ranchos were entitled to the rights of a riparian owner in the waters of the stream. If such were the rights incident to and passing by the grants, which grants have been determined by the proper authorities of the United States to have been valid grants, then the property right is protected by the treaty, and the Federal Court not only has the power but must necessarily determine for itself whether those rights existed or not under the laws of Spain and Mexico.

Beard v. Federy, 3 Wall. 478;
Knight v. United States Land Association, 142 U. S. 161.

There one of the parties claimed under the State of California, the other under the city and county of San Francisco. Both claimed under the Mexican government. The lands in controversy were between high and low water mark. On the part of the grantee from the state it was claimed that the title to these lands passed from Mexico to the United States in trust for the future state, and that immediately upon the admission of California the title vested in it by virtue of its sovereignty. The other party claimed that, when the property was the prop-

erty of the Mexican government it had the power to grant the lands between high and low water mark. That it did grant them to the pueblo of San Francisco. That its claim had been confirmed, a survey had been made and a United States patent had been issued therefor, and which patent embraced the lands in controversy.

This court did consider the question of the power of the Mexican government in this respect, and decided that the title of the United States derived from the Mexican government was not held in trust for the future state, where the lands had already been granted or property rights in them had vested in other persons, and upheld the title springing from the pueblo.

In the course of the opinion Mr. Justice Lamar, among other things, said:

"For it is equally well settled that when the "United States acquired California from Mexico "by the Treaty of Guadalupe Hidalgo, 9 Stat- "utes, 922, they were bound under the eighth "article of the treaty to protect all rights of "property in that territory emanating from the "Mexican government previous to that treaty. " * * * * Irrespective of any such pro- "vision in the treaty, the obligations resting "upon the United States in this respect, under "the principles of international law, would have "been the same. * * * * These observa- "tions lead directly to the determination of the "force and effect of the title of the pueblo of "San Francisco derived from the former govern- "ment of Mexico as opposed to the title which

"it is insisted passed to the state of California "upon its admission into the Union, by virtue "of its sovereignty over all tide lands in the "state below high water line, even including "such as are situated within the limits of the "pueblo."

See also San Francisco v. Leroy, 138 U. S. 656.

The court referred to the case of Weber v. Board of Harbor Commissioners, 18 Wall. 57, 65, where it had been held that the titles acquired by the United States to lands in California, under tide waters, from Mexico, were held in trust for the future state, so that their ownership and right of disposition passed to it upon its admission into the Union; but that that doctrine did not apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way.

Now in these cases the very question in controversy was what rights had the Mexican government, and what rights did pass from the United States as the successor of that government. This necessarily involved an inquiry into the Mexican law, the relations of the Federal Government to the Mexican government with respect to the title to the property, and with respect to the contending parties, and what title those parties acquired, both from the Mexican grant, and also from the act of Congress of the United States, and the patent issued to the city and county of San Francisco on the one

hand, and the rights acquired by the beneficiary of this trust which it was claimed attached to the property in the hands of the United States in its favor.

In Steinbach v. Lewis, 11 Wall. 506, it was said that the effect of a grant of land made in California before it was ceded to the United States must be determined by Mexican law.

It is further well settled that whatever rights remained in the Mexican government with respect to the property granted passed to the United States as the successor of the Mexican sovereighty, and by the treaty of cession, and passed from the United States government by its patent, in its aspect of a deed, taking effect at the date of presentation, and hence what rights passed by that patent, and what are incidents of the title thus acquired depend both upon the laws of the United States and the laws of Mexico, and as to the rights accruing through the laws of Mexico, they are protected by treaty.

In Smith v. Maryland, 6 Cranch, 286, Justice Washington, delivering the opinion of the court, after stating that the question was as to the jurisdiction of Supreme Court of the United States, says:

"It is contended by the defendants in error " that the question involved in the cause turns " exclusively upon the construction of the con- " fiscation laws of the State of Maryland passed " prior to the treaty of peace, and that no ques- " tion relative to construction of that treaty, " did or could occur, that the only point in dis- " pute was whether the confiscation of the lands

" in controversy was complete or not by the " mere operation of those laws without any " further act to be done."

If the former, it was admitted on the one side that the right of Annie Ottey, a British subject, was not saved or protected by the treaty, and if the latter, then it was agreed on the other, that it was protected, and he said:

"This argument proves nothing more than " that the whole difficulty in this case depends " upon that part of it which involves the con- " struction of certain state laws, and that the " operation and effect of the treaty, which con- " stitutes the residue of the case is obvious so " soon as that construction is settled. But still " the question recurs: Is this a case where the " construction of any clause in a treaty was " drawn in question in a state court and where " the decision was against the title set up in " such treaty?

"The only title asserted by the defendants in " error to the lands in dispute is founded upon " an alleged confiscation by the State of Mary- " land, and the conveyance to them of the right " thus acquired by the state. The title set up " by the plaintiffs in error, for Annie Ottey, " and the only one which could possibly resist " that claimed by the grantees of the state, is " under the treaty of peace, the sixth article of " which protects her rights, provided the con- " fiscation by the laws of the state was not " complete prior to the treaty.

"The point to be decided was and is, whether " this be a case of future confiscation within the

" meaning of the sixth article of the treaty; and " in order to arrive at a correct result in the " decision of that point, it became necessary in " the state court, and will be necessary in this, " to inquire whether the confiscation declared " by the state laws was final and complete at " the time the treaty was made, or not. The " construction of those laws then is only a step " in the cause leading to the construction and " meaning of this article of the treaty; and it is " perfectly immaterial to the point of jurisdic- " tion that the first part of the way is the most " difficult to explore."

In Owings v. Norwood's Lessee, 5 Cranch, 344, the case was ejectment. The defendant was seeking to defeat the plaintiff, not by the strength of the defendant's title, but by the weakness of the plaintiff's. A mortgage had been made to one Jonathan Scarth, and the defendant below, in order to show an existing title out of the plaintiff, contended that the mortgage to Scarth was protected from confiscation by the British treaty of 1794, and was still a security for the money to the representatives of Scarth, who proved to be still living in England. The Maryland court was of the opinion that on the expiration of the time limited in the mortgage for the payment of the money, a complete legal estate of inheritance vested in the mortgagee liable to confiscation, and that it had become vested in the state by the confiscation act of 1780, subject to the right of redemption in the mortgagee and his heirs, and the British treaty was not made until after

the confiscation and did not affect the plaintiff's right to recover in the ejectment.

Marshal, Chief Justice, said there were only two points in the case:

"1. Whether Scarth had such an interest as was "protected by the treaty, and; 2. Whether the present "case be a case arising under a treaty within the mean- "ing of the constitution, and the Court had no doubt on "either point. That the plaintiff in error did not con- "tend that his right grew out of the treaty, and whether "it was an obstacle to the plaintiff's recovery was a "question exclusively for the decision of the Courts of "Maryland. Harper on the next day suggested to the "Court that he understood the opinion to be that the "Court had no jurisdiction to revise the decision of the "state courts in cases where the construction of a treaty "was drawn in question incidentally, and where the "party himself did not claim title under a treaty, and "was about to make some further observations when "Chief Justice Marshall said, that Mr. Harper had mis- "understood the opinion of the Court in that respect. It "was not that this Court had not jurisdiction if the "treaty were drawn in question incidentally. The reason "for inserting that clause in the constitution was that "all persons who have real claims under a treaty should "have their cases decided by the National tribunals. "It was to avoid the apprehension as well as the dan- "ger of state prejudices. The words of the constitu- "tion are, 'cases arising under treaties.'

"Each treaty stipulates something respecting the "citizens of the two nations and gives them rights. "Whenever a right grows out of *or is protected by a*

"*treaty,* it is sanctioned againts all the laws and judicial "decisions of the states, and whoever may have this "right, it is to be protected. But if the person's title is "not affected by the treaty, if he claims nothing under "a treaty ,this title cannot be protected by the treaty. "*If Scarth or his heirs had claimed, it would have been "a case arising under a treaty.* But neither the title of "Scarth nor of any person claiming under him can be "affected by the decision of this cause."

The whole scope of the decision was, that as there was no party to that suit claiming under Scarth, no stranger to the title of Scarth could invoke the treaty's protection of that title. But the case is a direct authority for the proposition that the right need not be given by the treaty, but it is sufficient to have been a right already existing and to be protected under the treaty.

New Orleans v. De Armas, 9th Peters, 223, is one of the cases upon which the learned Judge of the Court below did in some measure rely, but it is submitted that the case is in favor of the contention here made by the plaintiff. In that case the Court said:

"The merits of the controversy cannot be revised "in this tribunal. We can inquire only whether the "record shows that the constitution, or a treaty, or a "law of the United States has been violated by the de- "cision of the state court.

"The appellees moved to dismiss the writ of error "because no such violation appears. In support of his "motion, the counsel, as we think in his argument, pre- "scribed too narrow a principle for the action of this "court. He says, very truly, that the 25th section of

"the Judicial Act is limited by the constitution and "must be construed so as to be confined within those "limits, but he adds that a case can arise under a consti- "tution or a treaty only when the right is created by the "constitution or by a treaty. We think differently. "This construction would defeat the obvious purpose of "the constitution as well as of the act of Congress. "The language of both instruments extends the juris- "diction of this court to rights protected by the consti- "tution, treaties or laws of the United States, from "whatever source those rights may spring. To sustain "the jurisdiction of the court in the case now under "consideration, it must be shown that the title set up "by the City of New Orleans is protected by the treaty "ceding Louisiana to the United States or by some act "of Congress applicable to that title. The counsel in "support of the motion contends, and we think cor- "rectly, that the treaty does not embrace the case." But then it is immediately shown why it does not embrace it, and it is because the very treaty stipulation was that the inhabitants of the ceded territory should be incorporated in the Union of the United States, and admitted as soon as possible according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States, *and in the meantime they shall be* maintained and protected in the free enjoyment of their liberty, property and the religion which they profess.

"This article," said the Court, "obviously contem- "plates two objects; one that Louisiana shall be ad- "mitted into the Union as soon as possible upon an "equal footing with the other states, and the other,

"that till such admission the inhabitants of the ceded "territory should be protected in the free enjoyment of "their liberty, property and religion."

But, now, in the meantime, Louisiana had been admitted to the Union, and its inhabitants to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and said the Court: "Had any one of these rights been violated while this "stipulation continued in force, the individual supposing himself to be injured might have brought his case "into this court under the 25th section of the Judicial "Act, but this stipulation would not operate when "Louisiana became a member of the Union, and its inhabitants were admitted to the enjoyment of all "the rights, advantages and immunities of citizens of "the United States."

The Court then remarked: "That it was not one of "the immunities of the inhabitants of states generally "to have their titles to real property determined in Federal courts, and that as the treaty stipulation had "come to an end, there was no obligation upon the "United States to protect those rights through its own "tribunals, and there was a distinct declaration that if "there had been such a violation while the treaty stipulation was in force, the Federal courts would have had "jurisdiction."

But now the treaty stipulation with Mexico was not limited in point of time, and it has not ceased to operate.

It is submitted that these cases clearly establish the following points:

(a) It is not necessary that the right claimed

should be one given by a treaty. It is sufficient that it is a right to be protected by the treaty, in which case it does involve the construction of the treaty.

(b) The Federal courts in protecting these rights in accordance with the treaty stipulation not only have but must necessarily exercise the power of making inquiry as to whether the right itself exists.

(c) To determine this question it looks to the laws of the country under which those rights were created or arose and determines for itself, uninfluenced by the decisions of the state court, whether the right did exist.

(d) It makes no difference, for the purposes of the jurisdiction of the court, that the first step, viz: inquiring into the existence of the right may be the more difficult, nor indeed that when that is determined the treaty protection is obvious; nor will it defeat the jurisdiction, that the parties should agree, the one that if the right did exist it was protected by the treaty, and the other, if it did not exist when the treaty was made, that it was not protected by it.

The cases, however, which had the greatest influence upon the mind of the learned Judge of the Court below, and in fact which controlled the decision in this case were Phillips v. The Mound City Land and Water Association, 124 U. S. 605-612, and the California Powder Works v. Davis, 151 U. S. 389-391. (See Transcript on Appeal, pp. 58-59.)

Phillips v. The Mound City Association was a suit for a partition of two adjacent tracts of land in the County of Los Angeles, known as the San Jose and San Jose Addition Ranchos. They were both Mexican grants and had been granted in 1837 by the Mexi-

can government to Ygnacio Palomares and Ricardo Vejar, and afterwards one Luis Arenas had acquired a third interest in the two ranchoes, and then had conveyed this title to Henry Dalton.

The grants were confirmed, first by the Land Commissioners, who had confirmed the title of each to the particular allotment made to him under what was claimed to be a previous partition of the ranchos. The United States District Court, however, confirmed the grants of the two ranchos to the parties then owning the same, as tenants in common, and the patent from the United States issued to them as tenants in common.

In opposition to the suit for partition, the defendants pleaded that there had been a former partition under the Mexican regime and possession taken under it, and that the two ranchos were no longer held in common, but each was the owner of the allotment made to him, in severalty. The Superior Court of the County of Los Angeles found against this alleged partition, and that judgment was affirmed by the Supreme Court of California, and the case was taken to this court by writ of error to the state court. A motion was made to dismiss, and it was granted.

It is admitted that some of the remarks made in the opinion seemed to be against our contention, but the decision itself upon the facts of the case is not against us.

It is said in one place that:

"Article VIII of the treaty protected all existing "property rights within the limits of the ceded terri- "tory, but it neither created the rights nor defined them.

"Their existence was not made to depend on the con-
"stitution, laws or treaties of the United States.
"There was nothing done but to provide that if they
"had in fact existed under Mexican law or by reason
"of the action of Mexican authorities, they should be
"protected. Neither was any provision made as to the
"way of determining their existence. All that was left
"by implication to the ordinary judicial tribunals.
"Any court, whether state or national, having jurisdic-
"tion of the parties and of the subject-matter of the
"action, was free to act in the premises."

124 U. S. 610.

All this may be conceded without in any manner affecting the question here. It is not denied that a state court having jurisdiction over the parties and subject matter of the action may pass upon all these questions. The real question is, when the court of last resort has passed upon it and the decision is against the right claimed, whether the United States Supreme Court has not the appellate jurisdiction, or if the suit be brought originally in the Circuit Court of the United States, the question is, would that court have the jurisdiction, as being one of those ordinary tribunals, to which the party may apply for redress.

The treaties which were under consideration in the cases which we have cited were not different from this Mexican treaty in the particulars here mentioned. The rights which were there claimed were not created by the treaty, and it was distinctly held that they need not be. It was sufficient that they were entitled to protection under the treaty. Neither did the treaties in any of those cases define those rights of property which

it meant to protect under the Mexican treaty. But in Phillips vs. Mound City Association the Court also said, after stating the facts:

"The single question presented to the Court below "for determination was whether there had *in fact* been "such a partition. To establish this fact, proof was "made of what had been done by and before the Mexi- "can tribunal in that behalf, and the Court held that "it was insufficient. In so doing it decided no ques- "tion of Federal law, but only that the legal effect of "what had been done was not such as was required to "bind the parties by the partition. In this particular "the case stands precisely as if instead of a partition "under the form of a judicial proceeding, one had been "made by the voluntary conveyances of the parties after "the original grants and before the treaty. Had the ef- "fort been in this case to establish such a partition in- "stead of one through judicial action, we can hardly "believe it would be claimed that a Federal question "was presented by a decision that the conveyances "which were put in evidence did not furnish the neces- "sary proof. Yet that is substantially this case."

124 U. S. 611.

Now if a partition by deed or by parol acted upon had been relied upon, and it had been denied that any such partition had been made, and the Court had found as a matter of fact that it had not been, we do not doubt that under the well settled principles, the Federal court would have had no jurisdiction, and the case, in the passages here quoted, seemed to turn upon the proposition that whether that partition was made or not was a question of fact submitted to the court, and that the court decided against it.

But if the facts themselves were agreed upon, and it was claimed by one party that they did, under the laws of Mexico, constitute such a partition, and by the other, that they did not, it would seem to be a very simple way of disposing of all rights which the United States guaranteed by the treaty to protect, if the state court can avoid the Federal jurisdiction by simply declaring that the right was not such as was recognized by Mexican law.

California Powder Works v. Davis, 151 U. S. 389, we think is entirely disposed of as an authority upon the question here presented by the facts upon which it turns. That controversy arose upon two conflicting patents for land issued upon confirmed Mexican grants. It was held that the confirmation of the claims of these respective parties might be conclusive against the United States and those claiming under them, though such confirmation and patent had no effect upon the interests of third parties. (151 U. S. 394.) And in that case, the question was upon the genuineness of one of those grants, and the state court held that the decree of confirmation of the Land Commissioners of the grant to Bocle had been procured by fraud—that in fact no such grant had been made, and the paper purporting to be such grant was false, simulated and fabricated, and made after the conquest of California by the United States from the republic of Mexico in or about the year 1848, and was fraudulently imposed upon said Board of Land Commissioners as valid and genuine.

The Supreme Court of the United States held that this was a decision upon a question of fact, and that

the court had no jurisdiction.

The present controversy is of no such character. It involves: *First,*

The determination of the question as to what rights under Mexican law and by virtue of the grants of the Ranchos Los Felis and San Rafeal by the Mexican and Spanish governments in the waters of the Los Angeles river and in the waters percolating in the soil passed to the grantees, as incidental to the ownership of the land, or rather as to what rights in the said waters, both the surface and subterranean, were included in the grants, as part and parcel of them.

That it is the duty of the United States courts to look into these laws for the purpose of determining what rights accrued to the grantees under them, is, we think, determined by the cases cited, and furthermore, those laws are not foreign laws, but are part of the laws of the United States for the purpose of performing the obligations incurred by that government under the treaty, and the federal courts are bound to take judicial notice of them as much so as the laws of the states of the Union.

U. S. v. Chaves, 159 U. S. 452, and the cases cited.

U. S. v. Kingsley, 12 Peters 476.

Second. What rights therein passed to the United States government from Mexico and from the United States to the patentees.

No controversy is made about the existence of the grant, or at least none is disclosed in this proceeding, as far as it has gone, and it is respectfully submitted

that the suit is one arising under and involving the construction of the treaty.

2. The suit arises under the laws of the United States.

The Congress of the United States has at divers times asserted or assumed that the United States Government as to the public lands is vested with all of the rights of a riparian proprietor in the innavigable streams flowing through those lands.

By the Mining Act of 1866, 14 Statutes 253, Congress declared that:

"Whenever by priority of possession, rights to the "use of water for mining, agricultural, manufacturing "or other purposes, have vested and accrued * * * "the possessors and owners of such vested rights shall "be maintained and protected in the same."

Revised Statutes, Sec. 2339.

By the Desert Land Act, so called, the right to the use of water for the reclamation of desert lands, in accordance with the provisions of the act approved March 3, 1887, is made to depend upon bona fide appropriations. It was provided that such rights should not exceed the amount of water actualy appropriated, and necessarily used for the purpose of irrigation and reclamation, and all surplus water over and above such actual appropriation and use, together with the water of lakes, rivers and other sources of water supply upon the public lands, and not navigable, should remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.

19 Statutes 377.

Since the passage of the act of 1866, and under the Revised Statutes, Sections 2339 and 2340, the Supreme Court of California has held that one who makes an appropriation of water upon the public lands, and acquires a right, by that act recognized and confirmed, holds the waters by an express grant from the United States.

Smith v. Hawkins, 110 Cal. 122, 125.

It had been long ago held that:

"The Government of the United States has an abso-"lute and perfect title to its lands. * * * Unless, "therefore, running waters are reserved, they pass by "grant or patent of the United States. It was so held "in Vansickle v. Haines, 7. Nev. 259. * * *

"Whatever may be the weight of authority of Van-"sickle v. Haines in other respects, the statement that "the grantee or patentee acquires from the United "States—the absolute and unqualified owner of the pub-"lic lands—common law rights in waters flowing "through the lands granted (except where the waters "or a portion of them are reserved) has never been dis-"puted."

Laux v. Haggin, 69 Cal. 340.

See the cases also referred to of

Vansickle v. Haines, 7 Nev. 259.

Union M. & M. Co. v. Ferres *et al.*, 2nd Sawyer 176.

Sturr v. Beck, 133 U. S. 541.

Now the rights which the United States acquired to the lands within the ceded territory, and the effect of its patents upon confirmed Mexican grants have been

considered so often that it is scarce worth while to refer to authorities to prove that the United States succeeded to all the rights of the Mexican Government to the public lands, its proprietary rights as well as its sovereign dominion over them; that if the Mexican grant was not perfect and complete, whatever right, title or interest remained in the Republic of Mexico passed to the United States—that it took this title charged with the duty of protecting and upholding all rights and interests which had vested under the former government; that the patent of the United States, when it comes, has a two-fold aspect, in one of which it operates as a deed of quit-claim on the part of the United States, and in the second place is a record of the action of the Government upon the title of the claimant as it existed upon the acquisition of the country, are all principles well settled, and all of them may be found decided with numerous authorities cited, in

Knight v. United States Land Association, 142 U. S. 161, 183, 188.

Hence, whatever title may have yet remained in the Mexican Government in the Ranchos Los Felis and San Rafael passed to the United States by the cession of the territories in which they are embraced. Hence, we say that whether the Mexican laws concerning the rights of owners of lands under Mexican grants were the same as the laws of the United States or not, or whether their laws respecting the ownership of the waters percolating in the soil, by the owners of the soil, were or were not the same, yet as the entire title to these lands, both of the Mexican Government, and that of the United States passed to the grantees by virtue of

the Mexican grants and the United States patents, then —unless there was some previous right granted to other parties (in this instance the Pueblo of Los Angeles, if there was any such thing)—then we say that by virtue of the United States patent, and under the legal rights of the United States in that land at the time of the issuance of the patent, the patentees became vested with the title to the percolating waters, as well as to the rights of riparian owners in the waters of the stream.

Now, that being the case, long after the grants were made, and after the acquisition of California, the Legislature of the State of California, did pass an act on March 26th, 1874, the first section of the second article of which is as follows:

"That there be and hereby is granted to said cor-"poration to be by it held, used and enjoyed in absolute "ownership, the full, free and exclusive right to all of "the water flowing in the River Los Angeles at any "point from its source or sources to the intersection of "said river with the southern boundary of said city; "also the right to develop, economize, use and utilize "all waters flowing beneath the surface in the bed of "said river at any point or points between the point of "terminii above given; and for that purpose, it is here-"by declared that the powers to condemn property out-"side of the limits of said city, given by the provisions "of Sec. 2, Art. II of this Act, in so far as the same "relate to the condemnation of property and water for "increasing the water supply of said city, are intended "to be given and to be restricted to such sources of sup-"ply and to the rights therein, excepting and reserving

"from the operation of the aforesaid grant of the water "flowing in said river, unless the same be condemned "and taken for public use as herein provided, all vested "private rights to the water flowing upon the surface "or beneath it, in the bed of said river; and provided "that the said corporation shall not in any manner dis- "pose of, transfer, or convey any portion of said water "or any right to develop or use the same or any portion "thereof to any corporation, association, individual or "other person who might or would use the same in any "way prejudicial to the use thereof for irrigation with- "in the limits of said city, or who might or who would "at any time, for any good or valuable consideration, "desire to sell or in any way dispose of it to any other "person, natural or artificial, any interest therein, or "right to the use thereof;

"And provided further, that the zanjas which are with- "in the limits of said city known as the principal zanja "and zanjas Numbers 1, 2, 3, 4, 5, 6, 7 and 8, are here- "by declared public zanjas; and the quantity of water "which has heretofore generally flowed in each one of "said zanjas is hereby declared to be the quantity "which, by right, belongs to each one of said zanjas, "and to the farmers and fruit growers who are bene- "fited by their use."

Statutes of 1873-4, p. 633, Art. II, Sec. 1.

We have quoted only so much of said section as bears upon this particular question.

In 1878, the charter of the City was again amended by the Legislature, and the first section of the second article is as follows:

"There is hereby granted to said corporation, to be

"by it held and enjoyed in absolute ownership, the full, "free and exclusive right to all the water flowing in the "River Los Angeles, at any point from its source or "sources to the intersection of said river with the south- "ern boundary of said city; also the right to develop, "economize, use and utilize all the waters flowing be- "neath the surface in the bed of said river, at any point " or points between the points of terminii above given, "and for that purpose, it is hereby declared that the "powers to condemn property outside of the limits of "said city given by the provisions of Sec. 2, Art. II of "this act, in so far as the same relate to the condemna- "tion of the property and water for increasing the "water supply of said city, are intended to be given "and to be restricted to such sources of supply and to "the rights therein;

"And provided that said corporation shall not in "any manner dispose of, transfer or convey any por- "tion of said water, or any right to develop or use the "same or any portion thereof, to any person, associa- "tion, individual, or other person, who might or would "use the same in any way prejudicial to the use thereof "for irrigation, domestic and culinary purposes within "the limits of said city, or who might or would at any "time, for any good or valuable consideration, desire "to sell or in any way dispose of, to any person, natural "or artificial, any interest therein, or right to the use "thereof;

"And provided, further, that the said corporation, "by ordinance duly enacted by its Council, as hereinaf- "ter provided, shall have the power:

"*First.* To declare and make all zanjas now exist-

"ing or hereafter constructed within the limits of said "city, public zanjas.

"*Second.* To fix, regulate and control the amount "and disposition of the water which shall run and be "contained in and conveyed by each and every one of "said zanjas.

"*Third.* To make and enforce all rules and regula- "tions necessary to maintain and protect said zanjas, "and the waters flowing therein, and to prevent the de- "filement or pollution of said waters by the flowing "into the said zanjas of any filth or matter detrimental "to the public health, or by the discharging therein of "the contents of any drain, sewer or sink, or in any "other manner whatsoever; to provide for the prosecu- "tion and punishment, in the proper courts, of all per- "sons offending against said rules and regulations."

Statutes 1877-78, p. 643, Art. II, Sec. 1.

By the constitution adopted in 1879, and the several amendments thereto, it was provided that cities having a certain number of inhabitants, and which included Los Angeles City, might frame a charter for their own government, consistent with and subject to the constitution and laws of the State, by causing a Board of Freeholders to be elected, who should propose the charter, and if adopted by the electors of the city, it should be submitted to the Legislature for its approval or rejection, as a whole, and when ratified by the Legislature, and certain other procedure taken, it became the charter of the city.

Const. 1879, Art. IX, Sec. 8.

Under this provision, the City of Los Angeles adopted a charter in 1888, which was submitted to the

Legislature of the state in 1889, and by the Legislature ratified, and in Art. XVIII of that charter, Sec. 190, it is declared that:

"The City of Los Angeles shall continue in the own-"ership and enjoyment of all rights to the waters of the "River of Los Angeles heretofore vested in its prede-"cessor or predecessors, including the Pueblo of Los "Angeles, and is hereby declared to have the full, free "and exclusive right to all the waters flowing in the "said river at any point from its source or sources to "the intersection of said river with the southern "boundary of said city, and also the ownership of and "the right to develop, economize, control, use and util-"ize all water flowing beneath the surface in the bed of "said river, at any point or points between the points of "terminii above named."

Sec. 190, Art. XVIII, Statutes of 1889, pp. 502 and 503.

"Section 191. The said city shall not convey, lease "or otherwise dispose of its right in said waters or any "part thereof or grant or lease to any corporation or "person, any right or privilege to use, manage or con-"trol said waters, or any part thereof, for any purpose, "public or private, otherwise than by license revokable "by said city at pleasure upon notice not to exceed six "months; provided, that this provision shall not be con-"strued to prevent the ordinary sale and distribution "of the said waters to the inhabitants of the city, or per-"sons doing business therein, for irrigating and domes-"tic uses, and for manufacturing purposes other than "for water power."

"Section 192. The said corporation shall have the

"right and power to construct, maintain, and operate "water works, dams, reservoirs, ditches, canals, and "other means to conduct the said waters from said riv- "er at all points between the said terminii, and to sup- "ply the city and its inhabitants with water, and to dis- "tribute such water through any zanjas, pipes or other- "wise, into, upon and over the lands within the limits "of said city, which water mains by whomsoever here- "after laid in said city shall be of such material and "such capacity as shall be prescribed by ordinance; pro- "vided that no such mains shall hereafter be laid in said "city of less dimension than four inches in diameter."

Section 193 relates to the rates of compensation for the use of the water and is not material here.

This last statute is not specially set forth in the bill, but it is submitted that this court takes judicial notice of the laws of the State of California, including the charters of cities, at least when they are public laws, and that it is not necessary to specially plead them. It is sufficient if, from the facts alleged in the bill, the Federal question does arise as a matter of law, where those laws are such as this court takes judicial notice of.

All courts take notice of the constitution of the United States and the laws of the State where they are exercising their functions without the same being pleaded.

Sherman v. Nichols, 8 Wall. 44;
Marbury v. Madison, 1 Cranch 137;
Hinde v. Battier, 5 Peters 398;
Priestman v. U. S., 4 Dallas 28.
Lemar v. Micou, 114 U. S. 218.

And where countries have been acquired by the United States, the laws of such countries are not foreign laws, and the United States Courts will take judicial notice of those laws which prevailed up to the time of the acquisition.

U. S. vs. Perot, 98 U. S. 28.

U. S. vs. Turner, 11 How. 663.

Courts take judicial notice of a municipal charter when declared by the Legislature to be a public act.

Case v. Kelly, 133 U. S. 21.

See further 4th Nat'l Bank of N. Y. v. Francklyn, 120 U. S. 747.

And the Courts of California take notice of the fact that a city or town is incorporated, without proof and without averment.

City of Pasadena v. Stimson, 91 Cal. 238, 256.

The United States Courts will take judicial notice of the authority of a municipal corporation to borrow money under a supplement to its charter.

Anfey v. Donoghue, 116 U. S. 1;

Renaud v. Abbott, *Id.* 277.

Now the constitutional prohibition againts passing laws impairing the obligation of contracts applies as well to executed as to executory contracts.

Sedgwick on Constitutional and Statutory Law, p. 587 *et seq.*

Fletcher v. Peck, 6 Cranch 133.

Hawkins v. Barney's Lessee, 5 Peters, 457;

Cooley's Constitutional Limitations p. 273-274, also page 285.

Tucker on Constitution, Vol. II, pp. 827-829 and 838 and authorities cited.

Now if under the patent from the United States, the

grantors of the plaintiff acquired the rights which we claim, that these statutes impaired the obligation of the contract is too obvious to require argument or citation of authorities; and it is just as obvious that those statutes deprive the plaintiff of its property without due process of law, or at least attempt to do so, as it is that they are in violation of those contract rights.

To avoid the jurisdiction of the Court for the matters alleged with respect to these statutes, there are several different suggestions made by the learned counsel for the defendant, not all of which, however, were concurred in by the learned Judge of the Court below. Among them are the following:

(a) The plaintiff has no such rights, either under the laws of Mexico or through the patent of the United States, as are claimed. The claim of the City of Los Angeles to these waters, both of the river and of the waters percolating in the soil, is valid and arises out of some supposed paramount right which accrued to a Mexican or Spanish pueblo by virtue simply of its being such.

But this, it is submitted, is no answer at all; for before this can be accepted by the Court, there must be the examination and the decision of the Court that that is correct; but that is the exercise of jurisdiction, and the very jurisdiction which we are here invoking.

In Hamilton Gaslight Co. v. City of Hamilton, 146 U. S. 258, and Shively v. Bowlby, 152 U. S. 1, and many other cases, the Court has sustained the jurisdiction while nevertheless deciding the case against the plaintiff. Thus, in the Hamilton Gaslight case, it was claimed there that the law impaired the obligation of

the contract. This Court said there was no doubt of the jurisdiction, but the decision finally was that it did not impair the obligation of the contract.

(b) It is also claimed that the particular clauses of the constitution claimed to have been violated should be set forth in the bill; but this is not necessary.

Hanford v. Davies, 163 U. S. 273.

Meyers v. Hettinger, 94 Fed. 370.

Gordon v. Bank, 144 U. S. 97.

Express Co. v. Kountze, 8 Wall. 342.

Jones v. Andrews, 10 Wall. 327, 331.

(c) It is claimed that the rights acquired in the waters of the stream (including the underground waters which as alleged in the bill, are claimed to constitute a part of the Los Angeles river) either under the Mexican or Spanish grants or the United States patents are questions merely of state law; and to support this, it is said that the states have the exclusive power to determine the rights of riparian owners.

Even if this were true, it would be no answer here, for the rights vested by those grants and by the United States patents were long anterior to the acts of the Legislature of which we complain, and it had been decided repeatedly by the Supreme Court of the State of California, that the owner of lands through which a non-navigable stream flows has the rights of a riparian proprietor as those rights were established at common law, modified only to a very limited extent by the condition existing in this country, and that the United States holds the public lands as any other proprietor, and with all the common law rights of a riparian owner, and that a grant of the public lands of the United States carries with it those rights unless the waters are

expressly or impliedly reserved by the terms of the patent, etc.

Lux v. Haggin, 69 Cal., 255, 336, *et seq.*

Hence, those rights having once vested, could not be divested by any subsequent legislation by the state, no matter what her powers over them might have been before the acquisition of the title. But then this Court has never held that the states have any such power over the property of the United States. The case principally relied upon by our adversaries is Eldridge v. Trezevant, 160 U. S. 452. It is no authority for any such a proposition. The question there was, as to the rights of riparian owners to the shores of navigable streams.

The lands there bordered upon the Mississippi river, and one of the authorities cited for the decision was Barney v. Keokuk, 94 U. S. 324-327. In that case the Court said:

"It is generally conceded that the riparian title at-
"taches to subsequent accretions to the land affected by
"the gradual and imperceptible operation of natural
"causes. But whether it attaches to land reclaimed by
"artificial means from the bed of the river or to sud-
"den accretions produced by unusual floods, is a ques-
"tion which each State decides for itself."

The Court then remarked upon the confusion of navigable with tide water, found in the monuments of common law and which had long prevailed in this country, and for two generations had excluded the admiralty jurisdiction of the federal courts from the great rivers and inland seas of the United States, and that it had led to the foundation in many states of doctrines with re-

gard to the ownership of the soil in navigable waters above tide water, at variance with sound principles of public policy. Whether as rules of property, it would be safe to change these doctrines where they have been applied, was for the several states themselves to determine. If they chose to resign to the riparian proprietor rights which properly belonged to them *in their sovereign capacity*, it is not for others to raise objections.

The entire passage isquoted in the Trezevant case,and it is obvious that they are treating of navigable waters, and not innavigable streams.

No one pretends that the River of Los Angeles, or any other non-navigable stream in the State of California does now or ever did belong to the state in her sovereign capacity.

Another case cited in Trezevant's case is Packer v. Bird, 137 U. S. 661. In that case, at page 669, Justice Field, delivering the opinion of the Court, said:

"The Courts of the United States will construe the "grants of the general government without reference to "the rules of construction adopted by the states for "their grants; but whatever incidents or rights attach "to the ownership of property conveyed by the govern- "ment will be determined by the states subject to the "condition that their rules do not impair the efficacy of "the grants or the use and enjoyment of the property "by the grantee. An incident of such ownership, the "right of the riparian owner, where the waters are "above the influence of the tide, will be limited accord- "ing to the law of the state, either to low or high water "mark, or to extend to the middle of the stream."

But here again the Court was speaking of navigable waters.

Hardin v. Jordan, 140 U. S. 371, is another of the same kind, where it is said with regard to grants of the government for land bordering on tide water:

"It has been distinctly settled that they only extend "to high water mark, and that the title to the shore "and lands under water in front of lands so granted, "enures to the state within which they are situated, if a "state has been organized and established there. Such "title to the shore and lands and under water is re- "garded as incidental to the sovereignty of the state—a "portion of the royalties belonging thereto and held in "trust for the public purposes of navigation and fishery "—and cannot be retained by or granted out to individ- "uals by the United States. * * * Such title be- "ing in the state, the lands are subject to state regula- "tion and control under the condition, however, of not "interfering with the regulations which may be made "by congress with regard to public navigation and "commerce."

Id. 381-2.

"This right of the states to regulate and control the "shores of tide waters, and the land under them, is the "same as that which is exercised by the Crown in Eng- "land. In this country the same rule has been ex- "tended to our great navigable lakes, which are treated "as inland seas; and also, in some of the states, to nav- "igable rivers, as the Mississippi, the Missouri, the "Ohio, and in Pennsylvania, to all the permanent riv- "ers of the state; but it depends on the law of each state "to what waters and to what extent this prerogative of

"the state over the lands under the water, shall be ex-
"ercised."

Shively v. Bowlby, 152 U. S. 1, was another of the same kind. The lands in all of these cases were bordering on navigable waters. The controversy was always concerning the title to lands below high water mark, some of the parties claiming under the state, some under United States patents. The ground upon which they were all proceeding was that the state owned the tide lands, or the lands between high and low water mark, of navigable waters, and had the power to dispose of them. If, therefore, the state chooses to declare that the deeds or patents of the United States or any other instrument conveying lands bordering on navigable waters shall be deemed to extend to the middle of the stream or to low water mark, it is perfectly competent for it to do so, and this is all that is decided in any of them.

In the case of Knight v. the Land Association, *supra*, the controversy was of the same kind, but the Court determined that there had been a grant of these tide lands that were in dispute, before the existence of the State of California, and hence, that the state never became the owner of those lands, and the title claimed under the City of San Francisco was good.

Trezevant's case may have carried the doctrine a little further, as it related to building levees on the banks of the river, and a little way from the bank proper. But this arose from the character of the river, and the necessity of such works to protect the country from inundation. And this power as part of the sovereign control over the shores had been asserted and exercised under the former government, and all lands granted

along the shores of the Mississippi had from time immemorial been held to be subject to the servitude, and subject to be occupied by the public for the purpose of building and maintaining levees; but that no new principle was introduced by this case is fully shown by the authorities cited in its support.

It would be strange if any such power did exist in the states. It has been frequently decided, and by the Supreme Court of California, and it is the common law, that the riparian owner's right to have the water flow as it is accustomed to flow, is neither an easement nor an appurtenance, but is a part and parcel of the soil, as much so as the trees that grow upon it, or the rocks that are imbedded in it. It was so decided in Lux v. Haggin, and has been so decided many times since.

Now the act of admission of California into the Union forbids it to do any act that will interfere with the disposition of the public lands of the United States. If the state had the power to declare what rights one should have to the use of the waters of non-navigable streams flowing through the public lands, why would it not equally have the power to strip the title of the United States of all the incidents of ownership, and deny the grantee of the United States any use of the property whatever. It is submitted that it is not a matter of state prescription.

(d) The further argument was made in the court below that if the statutes did impair the obligation of a contract or deprive the plaintiff of its property without due process of law, why, of course, they were void, and that the city made no controversy with the plain-

tiff about this. The force of this argument is not very apparent. If the argument were valid, it would seem necessarily to result that the jurisdiction of the Federal Court would never exist, upon the ground that the obligation of a contract was impaired, or one is divested of his property without due process of law, except where its jurisdiction would be useless. For, if the statute did deprive one of his property, or impair the obligation of a contract, the Federal Courts could afford noprotection against it. If it did not the Court would have no jurisdiction.

(e) The claim, however, which was sustained by the Circuit Court, and the ground upon which this bill was dismissed, was that the answer constituted such a disclaimer as to defeat the jurisdiction, in so far as it rested upon the constitutional provision against impairing the obligation of contracts and divesting property rights. The learned Judge of the Court below was of the opinion that the other grounds of jurisdiction claimed were insufficient. Now the supposed disclaimer is contained from Fol. 52, page 29, to Fol. 56, page 31 of the transcript. The answer admits; "that "the defendant does claim as the successor of the Mex- "ican Pueblo of Los Angeles, and by virtue of the laws "of Mexico governing and regulating and fixing the "rights of pueblos to the waters of streams flowing "through said public lands, and by the said several acts "of the Legislature mentioned in said bill purporting to "grant to said City of Los Angeles the sole and ex- "clusive right to the waters of the said river; that this "defendant is the sole and exclusive owner of all of the "waters flowing in said Los Angeles river from its

"sources to the southern boundary of said city, and of "the sole and exclusive right to develop waters perco- "lating under the bed of said river or elsewhere which "flow into and become a part of the waters of the said "Los Angeles river; but this defendant denies that said "sources of title are the only sources of title of this de- "fendant's said rights, but, on the contrary, alleges that "it also claims the said rights under the laws of Spain "governing, regulating and fixing the right of pueblos "to the waters of streams flowing through such pueblos "or used by such pueblos, and under various grants to "its predecessor, the said Pueblo of Los Angeles of the "Spanish and Mexican governments, and also by long "and continued uses and possession of said river and "the waters thereof for a period of more than one hun- "dred years, and by various grants from private indi- "viduals, and by virtue of various judgments and de- "crees of courts of competent jurisdiction, and also by "virtue of its ownership of the land through which said "river flows, in passing through said four square "leagues patented to said Mayor and Common Council "of the City of Los Angeles."

Id., p. 29, Fol. 52.

Now here is a distinct assertion that it does claim under these acts of the legislature, although it claims under various other titles. To give the Federal Court jurisdiction it is not necessary that the only question involved should arise under a treaty, or constitution, or law of the United States, or that all the questions should be of that character; it is sufficient if any one of them is.

Gold Washing & Water Co. v. Keyes, 96 U. S. 203;

Osborn v. Bank of U. S., 9 Wheaton 738;
Leonard v. City of Shreveport, 28 Fed. 359;
Wilmington & Weldon R. R. Co. v. Allsbrook, 146 U. S. 293.

Passing further to this supposed disclaimer. In the next clause, commencing on page 29, the defendant, further answering, denied:

"That it claimed that the said last mentioned "acts of the legislature, or any one or more of "them, granted to the city of Los Angeles (the "predecessor of this defendant) any vested pri- "vate right, if any, in the water flowing or being "upon the surface or beneath it in the bed of "said Los Angeles river, or any water or right "whatsoever, if any, which was at the time of "the passage of said acts of the legislature, "vested in said Los Angeles City Water Com- "pany, or its predecessor in interest, or the "predecessor in interest of said Crystal Springs "Land & Water Company; but, on the contrary, "this defendant disclaims having acquired un- "der any of said acts of the legislature any "right, if any, to the water flowing upon the "surface or beneath it in the bed of said river or "any other water or right whatsoever, if any, "which was at the time of the passage of said "acts vested in said Los Angeles City Water "Company or its predecessor in interest, or in "the predecessor in interest of said Crystal "Springs Land & Water Company, or in any "private individual or corporation; and this de- "fendant denies that it claims, or ever claimed, "under or by virtue of said acts of the legisla- "ture, or any of them, the right to develop

"waters percolating in the bed of said river or "elsewhere, without having first obtained the "right of entering upon the land, to so develop, "from the owner of the soil where such devel- "velopment should be made, either by grant "from such owner or by condemnation of such "right, and in making compensation to said "owner therefor or otherwise.

"And further answering, the defendant denied "that it claimed, or ever claimed, that there was "granted by said acts of the legislature, or any "of them, to the city of Los Angeles * * * "any right, if any, to develop waters percolating "under the bed of said Los Angeles river or "elsewhere, which was at the time of the pas- "sage of said acts vested in any private indi- "vidual or corporation, or in said Los Angeles "City Water Company or its predecessors in "interest, or in the predecessor in interest of the "said Crystal Springs Land & Water Company; "and this defendant disclaims that said acts of "the legislature, or any one or more of them, "had the effect of granting to this defendant "any right, if any, to develop water percolating "in the bed of said Los Angeles river, or else- "where, which was at the time of the passage of "said acts vested in any private person or cor- "poration or in said Los Angeles City Water "Company, or its predecessor in interest, of said "Crystal Springs Land & Water Company."

The defendant admitted that it claimed that the excavations alleged in the bill of complaint,

were made without right, and that the water belonged to it, etc.

Id. pp. 29–31.

This, it is respectfully submitted, is no disclaimer at all. It distinctly claims under the statute and what the disclaimer really amounts to is a denial of the plaintiff's rights or the right of its predecessor. Now, to determine that question is, we say again, the exercise of jurisdiction, and not a ground for dismissing for want of it

The supposed authority for this dismissal is Robinson v. Anderson, 121 U. S. 522. The syllabus of that case is:

"When after all the pleadings are filed in a "cause in the "Circuit Court of the United "States, between citizens of the same state, it "appears that the averments in the declaration "which alone give the court jurisdiction, are im "material in the determination of the matter in "dispute, and are made for the purpose of creating "a case cognizable by the court, it is the duty "of the Circuit Judge to dismiss the bill for want "of jurisdiction."

Certainly there is nothing in this case that brings it within the syllabus of that case. Some of the defendants in that case answered denying that they were in possession of any portion of the premises in dispute. Others claimed that they were in possession by and with the consent of the plaintiff made and given to defendants by plaintiff's agent, and not otherwise. Others claimed to be in possession in severalty under and by virtue of written contracts, for the con-

veyance of said several tracts of land * * * by the plaintiff to the defendants. The action was ejectment. It was based upon a supposed conflict in the boundaries of two different ranchos, but when the answers were all in, the defendants were either not in possession at all or were there claiming under the plaintiff and not otherwise, and were not claiming under the Rancho Santiago de Santa Ana at all. The two cases are not parallel.

In Illinois v. Ill. Ry. Co., 33 Fed. 721, in which the Attorney-General of Illinois undertook to disclaim for the state any claim under a certain act of the legislature of that state, of April 15, 1873, Mr. Justice Harlan, delivering the opinion of the court, says:

"But it is contended that the case should be " remanded because it appears from the paper " filed by the Attorney-General of Illinois that " he disclaims reliance for any purpose whatever " in this proceeding upon the repealing act.

"It is quite sufficient upon this point to say " that the court is bound to take judicial notice " of that statute, and must give effect to it un- " less at the hearing it be adjudged to be uncon- " stitutional and void. The disclaimer of the " Attorney-General cannot work a repeal of the " act of 1873 nor close the eye of the court to the " fact that the state—if it could be constitution- " ally done—has repealed the act of 1869. As " the railroad bases its claim to own the lands " in question, and its authority to construct and " maintain wharves, docks and piers in connec- " tion with them upon the act of 1869, the court,

" notwithstanding this disclaimer, could not re-
" fuse to adjudge—if such should be its opinion
" —that the right of the company to claim any-
" thing under that statute, in respect to those
" lands, had been legally withdrawn by the re-
" pealing act. Even if the Attorney-General
" had stipulated with the Company that he
" would not, in this proceeding, claim anything
" for the state under the latter act, the court
" would feel obliged to disregard such stipula-
" tion.

"Whether the repealing act had such effect is
" a question which the company proposes to
" raise at the proper time and in proper form for
" judicial determination. Upon that claim de-
" pends the result of this litigation. The pres-
" ence in the cause of such an issue makes this
" a case arising under the constitution of the
" United States."

It is submitted that all this applies with much greater force in the present case. Not only could not the nttorneys for the city repeal the acts, but as already shown by the provisions of the charter, the city itself, acting in any way, was prohibited from disposing of the waters of the river or any of its rights therein. Now if it could not do this directly, neither could it do it by the indirection of a disclaimer. Besides, it can only be in rare and exceptional cases that anything can oust the jurisdiction of the Federal Court when it has once attached. It has been held that the jurisdiction of these courts cannot be vested or divested by the character of the defense made, but depends upon the

issues raised by the plaintiff's petition, and necessary to be determined to afford him an adequate remedy.

Sawyer v. Parish of Concordia, 12 Fed. 754.
Wilmington & Weldon R. R. Co. v. Allsbrook, 146 U. S. 293.
Osborn v. Bank of U. S. 9th Wheaton, 738, 819, 823, 824.

See also upon this point and upon the general subject of the jurisdiction of the Court in this case.

Woodruf v. Mississippi, 162 U. S. 291.

And the Federal Courts will determine for themselves whether the suit really involves a federal question, independent of the judgment of state courts.

Newport Light Co. v. City of Newport, 151 U. S. 527, 536, 537.
See Mobile & Ohio R. v. Tennessee, 153 U. S. 486.
Vicksburg etc. R. Co. v. Dennis, 116 U. S. 667.

We have not deemed it at all pertinent to the inquiry here what may be in fact, or rather, in law, the rights of the parties growing out of these claims under Mexican grants, Pueblo establishments and United States patents, for reasons already stated, namely, that those are the very questions to be determined in any decision upon the merits of the controversy. And the fact that they may be ultimately decided either this way, or that, has nothing whatever to do with the jurisdiction, for if the court has no

jurisdiction, it cannot decide anything about it. But if any such inquiry should be entered upon here, the caseof

United States vs. Santa Fe, 165 U. S. 675, has very materially qualified the opinions which many lawyers entertained respecting the rights of Spanish pueblos, and has completely refuted some propositions which have been contended for in California; among others it decides that a Spanish pueblo does not by the mere fact of its creation or organization become entitled to four square leagues of land, nor to any land whatsoever; but its title to those lands depends upon the making of a grant to them, and that the quantity contained in such grant is not a fixed and determined quantity passing by all such grants, but is of just whatever quantity may happen to be granted to it.

In the present case the city's title does depend upon a grant made by the Mexican government, and it is more than doubtful whether there was any such thing as a Spanish pueblo here at the time the grant was made. But, whether there was or not, would never establish the slightest foundation for the extravagant claim made by the city of Los Angeles, that as a successor of the Spanish pueblo it is the absolute owner not only of all the water flowing in the water course known as the Los Angeles river, but all percolating waters which by any process does or may find its way into that river at any point from its source or sources to the south boundary of the city.

Said this court in United States vs. Santa Fe,

165 U. S. 707: "It cannot be doubted that under the law of Spain it was necessary that the proper authorities should particularly designate the land to be acquired by towns or pueblos, before a vested right or title to the use thereof could arise."

Again on page 708: "There is nothing whatever designated by law as belonging to towns, other than that which by royal privilege, custom or contract between man and man, is granted to them, so that although there be assigned to the towns at the time of their constitution a territorio and pertinencias, which may be common to all the residents, without each one having the right to use them separately, it is a prerogative reserved to the princes to divide the terminos of the provinces and towns, assigning to these the use and enjoyment, but the domain remaining in the sovereigns themselves.

Considering this subject, this court, speaking through Mr. Justice Field in Grisar vs. McDowell, 6 Wall. 363, 373, said:

"These laws provided for the assignment to the pueblos, for their use and the use of their inhabitants, of land not exceeding in extent four square leagues. Such assignment was to be made by the public authorities of the government upon the original establishment of the pueblo, or afterwards upon the petition of its officers or inhabitants; and the land was to be measured off in a square or prolonged form, according to the nature and condition of the country. All lands within the general limits stated, which had previously become private property or

were required for public purposes, were reserved and excepted from the assignment.

Until the lands were thus definitely assigned and measured off, the right or claim of the pueblo was an imperfect one. It was a right which the government might refuse to recognize at all, or might recognize in a qualified form; it might be burdened with conditions and it might be restricted to less limits than the four square leagues, which was the usual quantity assigned."

Id. 708–9.

The opinion furthur shows that even after a formal designation the control of the outlying lands, to which a town might have been considered entitled, was in the King, as the source and fountain of title, and could be disposed of at will by him, or by his duly authorized representative, as long as such land were not affected by individual and private rights.

It furthermore distincly appears from this opinion that this right of the Mexican government over these pueblo lands passed to the United States, and it was in the exercise of that sovereign right that congress in enacting the laws of 1864 and 1866 carved out of the claim of San Francisco such land for public purposes, as it saw fit, and authorized further reservations to be made within a period of a year, and subjected the lands to specific trusts, imposed not alone upon the municipality of San Francisco, but also upon the general assembly of California.

Again: "Even after the assignment the interest acquired by the pueblo was far from being

an indefeasible estate such as is known to our laws. The purposes to be accomplished by the creation of pueblos did not require their possession of the fee. The interest amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands or as a source of revenue, or for other purposes. And this limited right of disposition and use was in all particulars subject to the control of the government of the country."

Id. 713.

Now, no such particular assignment was ever made by the Spanish or Mexican government, nor was any grant ever made to the city until the 25th day of August, 1844.

Tr. fol. 5 p. 3.

Nor was it ever surveyed and located at all until it was done by the United States government.

No such rights as are insisted upon here are even claimed to have been created by the said Mexican grant, unless those rights attach to the mere grant of the land themselves, and an incident under the laws relating to these pueblos. And we claim that there was no such law and no such right resulting from the grant, nor can they accrue by the acts of the legislature of the state of California. However, it is unnecessary to pursue this subject, or at least so we think, for that question is not before the court, but

simply the question of whether the Circuit Court had jurisdiction of the case. And it is repectfully submitted that the court has jurisdiction on all the grounds claimed, aud that the disclaimer was insufficient to oust the court's jurisdiction, and that the judgment of the Circuit Court should be reversed.

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